INDEX

	Page
Opinion Below	1, 2
Jurisdiction	2
Reasons Why Certiorari Should Be Denied	2

CITATIONS

Cases

Barnes v. Retail, etc., Assn., 125 F. (2d) 645	14
Baywell v. Springfield, etc., Co., 144 F. (2d) 65, cert. den. 323 U. S. 735, 65 S. Ct. 72	14
Chicago, etc., Coal Co. v. Herr, 127 Fed. (2d) 1010, certiorari denied 317 U. S. 669, 63 S. Ct. 74	14
Cromwell v. Hillsborough Twp., 149 F. (2d) 617, affd. 326 U. S. 620, 66 S. Ct. 445	14
DeLong v. Jefferson Standard Life Ins. Co., 109 Fed. (2d) 585, certiorari denied 310 U. S. 635, 60 S. Ct. 1081, 84 L. Ed. 1405	14
Driscoll v. Edison Light & Power Co., 307 U. S. 104, 59 S. C. 715, 83 L. Ed. 1134; rehearing denied, 307 U. S. 650, 59 S. C. 831, 83 L. Ed. 1529	11
In re Boswell, 96 Fed. (2d) 239	14
Magnolia Petroleum Co. v. Thompson, 106 Fed. (2d) 217, certiorari denied 308 U. S. 613, 60 S. C. 180, 84 L. Ed. 513	11
Malloy v. New York Life Ins. Co., 103 Fed. (2d) 439, certiorari 308 U. S. 572, 60 S. Ct. 86, 84 L. Ed. 480	14
Maryland Casualty Co. v. Cassetty, 119 Fed. (2d) 602	13
Meredith v. Winter Haven, 320 U. S. 228, 64 S. Ct. 7	11
New England Mutual Life Insurance Co. v. Mitchell, 118 Fed. (2d) 414, certiorari denied, 62 S. C. 60, 314 U. S. 629, 86 L. Ed. 505	13, 14
Portneuf-Marsh Valley Canal Co. v. Brown, 274 U. S. 630, 47 S. C. 692, 71 L. Ed. 1243	14
Propper v. Clark, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 436	14
Stone v. Interstate, etc., Co., 103 Fed. (2d) 544, 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 442	14
United States v. 150.29 Acres of Land, 135 Fed. (2d) 878	10
Wilson v. Massengill, 124 Fed. (2d) 666, certiorari denied, 316 U. S. 686, 62 S. C. 1274, 86 L. Ed. 1758	11
Yellow Cab Co. v. City of Chicago, 186 Fed. (2d) 946	9

Statutes

R. S. Nebr., 1943, Section 84-901	4, 5
Title 28, U. S. C. 1254 (1)	2

Supreme Court of the United States

o———o———o

OCTOBER TERM, 1951

o———o———o

No. 350

o———o———o

JOSEPH MOGIS,

Petitioner,

vs.

LYMAN-RICHEY SAND & GRAVEL CORPORATION, a Corporation,

Respondent.

o———o———o

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o———o———o

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

o———o———o

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 33) is reported at 189 F. (2d) 130 and the denial of rehearing (R. 95) appears at 190 F.

(2d) 202 affirming the opinion of the United States District Court for the District of Nebraska (R. 12) which appears at 90 F. Supp. 251.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the Eighth Circuit under the provisions of Title 28, U. S. C. 1254 (1).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The plaintiff truckers, nine in number, hauled sand and gravel for the defendant over a period of nearly four years without any protest or objection as to the amounts which they were being paid for the service. They did not request that they be paid the rate specified by the Motor Vehicle Tariff under consideration, but rather were content at the times of the various deliveries to receive the amounts actually paid by defendant. (See Judge Delehant's decision, R. top of page 36). There is no allegation in the complaint that the plaintiffs received these amounts under protest or that they ever objected that they were not being paid the rate called for by the Nebraska Railway Commision regulation. (See Complaint, R. page 2.) If the payments made by the defendant were not as per Commission regulations the plaintiffs in receiving them violated the regulation just as much as did the defendant in making them.

2. After four years of hauling for the defendant it was conceived by Mogis and the eight truckers who have assigned their claims to him that substantial additional compensation could be collected from defendant in the

guise of under-charges, and on September 15, 1949 (R. p. 5), this suit was instituted to collect an alleged undercharge on every truck load of gravel that had been hauled by these truckers between September 15, 1945, and April 5, 1949. The amounts claimed for the various assignors range from $3,000 to $10,000 and multiplied by three, total $138,000.00. It is the purpose of this lawsuit to collect this amount from defendant in addition to the amounts which plaintiffs were perfectly satisfied to receive at the time the services were rendered.

3. The theory upon which the plaintiffs would have this Court review the decisions of the District Court of the District of Nebraska and the Circuit Court of Appeals of the Eighth Circuit is that those Courts, particularly the last named Court, should have waited for some decision of the Supreme Court of Nebraska construing the statute in controversy. The argument ignores the fact that it was within the power of the plaintiffs in the first instance to secure a ruling by the Supreme Court of Nebraska on this question. The plaintiffs could have started their case in the state court. The principal office of the defendant is in Omaha, Nebraska, and its business is largely transacted in Nebraska. All of the hauling involved in this case was done in Nebraska (R. pp. 2 and 5, Complaint). Plaintiffs themselves are residents of Nebraska (R. p. 5). Instead plaintiffs elected to bring this case in the Federal Court, and there never was any suggestion by them that the decision should await an interpretation by the Nebraska Courts of the statute upon which their case depended, until after the Court in which they had brought the case had ruled against them. Then the plaintiffs, in an effort to by-pass the decision of the Federal District Court, started a de-

claratory judgment action in the District Court of Lancaster County, Nebraska, in which they asked the Court to construe the statute in question. The decision of the United States District Court was rendered on June 1, 1950 (R. 17). The declaratory judgment action was filed August 16, 1950 (R. 23). It was brought by the same attorneys who filed the instant case (R. 25), and it was filed in the name of one Albert Tady, who is one of the assignors of the plaintiff herein (R. 24). There is no showing in the record in this case, nor in plaintiffs' brief that this action has ever progressed beyond the filing stage, and, as a matter of fact, it has not. In fact, the plaintiffs refer to it in their brief filed herein in support of their application for certiorari as an "action now pending before the District Court of Lancaster County." (Plaintiffs' brief, p. 16.)

4. The plaintiffs well knew when they elected to start this case in the Federal Court that the validity of the regulation of the Nebraska State Railway Commission upon which they rely depended upon whether or not it should have been filed with the Secretary of State as per the Nebraska statute. In Paragraph III of the Complaint (R. 3) the plaintiffs allege that—

> "The transportation of sand, gravel, crushed stone and similar materials in commerce by motor carriers within the State of Nebraska, including the rates to be charged therefor, is subject to and is governed by the regulations of the Nebraska State Railway Commission * * *."

Note that the plaintiffs themselves describe the rate schedules under consideration as "regulations" of the Railway Commission. The plaintiffs knew, or are charged with knowing, that the Nebraska statute, Section 84-901,

Revised Statutes Nebraska 1943, required the Nebraska State Railway Commission, along with other administrative agencies, to file with the Secretary of State a copy of the "rules in force and effect," and defined the word "rule' as meaning—

> "The written statement of any rule, *regulation*, standard or policy of general application issued by an agency."

They further knew that by the terms of this statute no rule or regulation would be valid or enforcible unless so filed. They knew, of course, that the rate regulation upon which they were depending had never been filed with the Secretary of State, and they must have known that the question as to whether or not it should have been so filed would have to be passed upon and decided by the Court in which they elected to bring their case. That Court having decided the question, their remedy was to appeal (which they did), and not to start an action in the state court in an effort to avoid the effect of the decision. They are in no position now to claim that the Circuit Court of Appeals should have awaited a decision in the state court case, filed in the hope that they might get a state court ruling contrary to the decision of the Federal Court in which they brought their action. Especially is this true in a situation where the applicants concede that there is no other state court action pending in which the question here raised is involved except the one which they themselves have started, which action they must confess has not yet even been heard in the trial court, although it has been pending for more than a year. They would have this Court nullify the decision of the United States District Court and the United States Circuit Court of Appeals and send this case back to the District Court, there to await the possibility that the

Supreme Court of Nebraska may ultimately reach some different interpretation of the statute than that arrived at by two Federal Courts and this notwithstanding the fact that Judge Donohoe, who rendered the decision in the District Court, and Judge Delehant, who wrote the opinion in the Circuit Court of Appeals, are both Nebraska Judges and as capable of construing a Nebraska statute as any Judges of the Supreme Court of Nebraska.

5. While conceding that no Nebraska Court has ever passed upon the question as to whether rate regulations of the Railway Commission must be filed with the Secretary of State, the plaintiffs would have this Honorable Court entertain this case on the theory that the Courts below should have been ruled and controlled by (a) a Bar Association Committee Report (which incidentally is not shown to have had anything to do with the passage of the statute in controversy, although Judge Donohoe did mention it), (b) an opinion of the Attorney General, (c) some subsequently enacted legislation and Committee proceedings in connection therewith, and (d) the fact that the Nebraska Railway Commission has not filed rate regulations with the Secretary of State, thereby presumably indicating its administrative opinion that it was not obliged to do so.

In the first place, neither the Report of the Bar Association Committee, nor the Attorney General's opinion, nor the legislative proceedings referred to, are a part of the record in this case. They were brought to the Court's attention only through the medium of briefs filed by the plaintiff and are brought to this Court's attention only in the form of an "Appendix to Petition for Certiorari and Brief in Support Thereof." They are not

identified in any way as being a part of the record. That being so we do not know how the petitioners can ask this Court to review the case on the theory that the Court below did not give sufficient consideration to these documents. But the Circuit Court of Appeals, and the District Court to some extent, notwithstanding the absence of these documents from the record, indulged the plaintiffs by considering plaintiffs' arguments in connection therewith.

6. The record shows (a) that the trial Court considered that the context of the Bar Association Committee Report demonstrates that the Committee felt that "rates" were "rules" within the meaning of the latter term as used in the statute; and that therefore they should be filed with the Secretary of State (R. 14, 15), and (b) that the legislative history of this and subsequent acts indicated no legislative intention contrary to the conclusion reached by the Court (R. 14). The trial Court also considered the opinion of the Attorney General and found it not impressive (R. 15, 16). Likewise the Appellate Court considered the argument with reference to legislative history (R. 45, 48), and the Bar Committee Report (R. 49, 50), and was unable to read into those records the conclusions for which plaintiffs contend. The Circuit Court of Appeals likewise considered and discussed the opinion of the Attorney General upon which the applicants rely, and was unable to place upon it the construction contended for by the plaintiffs (R. 51). There is not here a situation wherein the Court ignored or failed to give substantial consideration to administrative acts and opinions which might throw light upon the interpretation to be given a statute. On the contrary both Courts gave substantial weight and respectful con-

sideration to these matters (R. 51), but could not arrive at the interpretation contended for by plaintiffs. In the prevailing opinion of the Circuit Court of Appeals not only were these matters given consideration separately but they were considered collectively (R. 50-57), including a thorough discussion of the things done and not done by the Legislature subsequent to the passage of the act in controversy, and Judge Delehant concluded by saying that—

> "Appraised in their aggregate effect, the conflicting considerations examined lead us to the conclusion that the district court's opinion respecting the meaning of the Nebraska law applicable during the interval involved represents an allowable and reasonable, although admittedly not the inevitable, view supported by authority and by accepted principles of statutory construction. More directly to the point, we are not convinced that the trial court was in error in its ruling."

7. What the petitioner is asking this Honorable Court to do is to take jurisdiction of the case for the purpose of ultimately holding that the Court to which plaintiffs submitted their case for decision should have refrained from deciding it until some State Court has passed upon the issue involved. Either that or that the Court to which they submitted their case did not give sufficient consideration to the interpretation placed upon the statute by others (not courts) and therefore did not properly interpret the statute—no question of the constitutionality of the statute being involved. We submit that there is no Federal question in this situation and that petitioners have no precedent for their request that the Supreme Court of the United States review the interpretation placed upon a state statute by the District Court and the Circuit Court of Appeals in the same case,

the opinion in both instances being by Federal Judges from the state whose statute is involved.

8. The petitioners would have this Honorable Court accept jurisdiction on the theory that much confusion has resulted from this decision and that the decision—

> "places in jeopardy all of the rates adopted by the state administrative agency authorized by state constitution and statutes to regulate all the public utilities and common carriers within the state." (Petitioner's brief, p. 26.)

There is no showing either in the record, the brief or in the appendix thereto that any such result has happened, or is apt to happen. No railroad, no telephone company, no power company, no utility of any kind ever intervened in this case or filed a brief amicus curiae, or ever evidenced any interest whatsoever in the case. If their tariffs had been in danger we may be sure that they would have appeared in the case in some capacity. Before the petitioners are entitled to ask the Honorable Court to consider the case on the theory that matters of vital public importance are involved or that substantial property interests are in jeopardy, the plaintiffs should present some evidence to the Court that such is the fact. This plaintiff has not done. The decision will affect only the haulers and the company here involved.

9. The next and last reason, as we interpret the brief, advanced by petitioners as grounds for the issuance of the writ, is that the decision is in conflict with two Seventh Circuit cases.

One of the cases which Petitioners cite, *Yellow Cab Co. v. City of Chicago,* 186 Fed. (2d) 94, was a case which involved a question of purely local law on which

the Illinois Court had not had an opportunity to pass. We have already pointed out that the plaintiffs herein could have given the Nebraska Court an opportunity to pass on the question involved by starting the case in the state court. We don't think the Yellow Cab case applies to situations where, as here, the plaintiff having lost in the Federal Court below starts a case in the state court in the hope that he can get a different statutory interpretation in that court, and then asks the Federal Court to stay proceedings on the chance that the state court may arrive at a conclusion different from that reached by the Federal Court.

In the other case, *United States v. 150.29 Acres of Land,* 135 Fed. (2d) 878, the Court said, to quote from petitioner's excerpt—

> "We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are unable to discern with assurance what that law is."

The Court went on to say that—

> "Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court."

Neither the United States District Court for Nebraska nor the Circuit Court of Appeals of the Eighth Circuit found itself in the position of being unable to discern with assurance what the Nebraska statute meant, nor were they in doubt as to how it should be construed. Both Courts gave the question great consideration and both came up with the same answer. So thoroughly did they analyze the question that there is little likelihood that the Supreme Court of Nebraska would reach a different conclusion. We cannot see any conflict between the

Seventh Circuit and the Eighth Circuit on any question here involved. And we cannot see how the judicial process would be in any way served by an order of this Court which would have the effect of holding in abeyance or, indeed, nullify a judgment already entered by the Circuit Court of Appeals for a year or a year and a half while the petitioners, in some action not yet even tried in the trial Court, experiment to see whether or not the Supreme Court of Nebraska will ultimately reach a conclusion different from that arrived at by two Federal Courts.

Petitioner's brief proceeds upon the theory that in every case where the construction of a state statute is involved it is the duty of the Federal Court to stand by until the court of last resort of the state has construed the statute. That, of course, is not the law. As stated in *Meredith v. Winter Haven,* 320 U. S. 228, 64 S. Ct. 7:

> "It has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

See also *Driscoll v. Edison Light & Power Co.,* 307 U. S. 104, 59 S. C. 715, 83 L. Ed. 1134; rehearing denied, 307 U. S. 650, 59 S. C. 831, 83 L. Ed. 1529; *Wilson v. Masengill,* 124 Fed. (2d) 666, certiorari denied 316 U. S. 686, 62 S. C. 1274, 86 L. Ed. 1758; *Magnolia Petroleum Co. v. Thompson,* 106 Fed. (2d) 217, certiorari denied 308 U. S. 613, 60 S. C. 180, 84 L. Ed. 513.

If Petitioner's theory is correct then Petitioner immediately after filing this case in the District Court for the District of Nebraska, should have asked for a stay pending a state court decision. No such request was filed. Instead Petitioner was content to submit the ques-

tion to the District Court and had no fault to find with the federal jurisdiction until the District Court had rendered a decision adverse to Petitioner's claims.

First Petitioner appealed and then attempted to raise the same issue in a declaratory judgment action filed in the state court, and then tried to get the Circuit Court of Appeals to postpone the hearing pending some decision in the declaratory judgment action. Petitioner includes in the record brought to this Court his "Motion of Appellant for Extension of Time to File Brief and to Delay Hearing of Appeal" (R. 22), but does not include the showing in opposition filed by the appellee. That such a showing was filed appears in the "Order Denying Motion of Appellant to Delay Hearing of Appeal" (R. 32).

The Court denied the motion (R. 32) and the Petitioner then abandoned the contention that it was the duty of the Circuit Court of Appeals to stand by until the state court had interpreted the statute, and proceeded to submit the case to the Circuit Court of Appeals solely upon the question as to whether or not rate tariffs prescribed by the Commission were to be included within the meaning of the word "rules" as that term appears and is defined in the Nebraska statute, and whether the failure of the Nebraska Railway Commission to file with the Secretary of State the rate tariffs upon which plaintiff relies rendered the same invalid (see Judge Delehant's opinion, R. 33-37).

Having again received a decision adverse to his interpretation of the statute Petitioner made the point in a Petition for Rehearing that the Court should have remanded the cause to the District Court with directions

to retain the complaint until the question of interpretation of the statute "shall have been decided by the Courts of the State of Nebraska" (R. 71, 72). Thus throughout this case it has been Petitioner's strategy first to find out how the Federal Court would decide the question and then, being dissatisfied, to insist that the Federal Court should not have ruled on the question at all.

The Circuit Court of Appeals in a Per Curiam opinion (R. 95) overruled the Motion for Rehearing on the ground that the case was purely one at law seeking a personal judgment for money, that it was not one of those exceptional cases where, after the case has been tried below, the Court of Appeals will mark time pending some decision in the state court, and that the Court had no power to suspend or stay decisions already rendered. The Court also indicated some puzzlement as to in what form or upon what terms the Court could make such an order (R. 97).

The Petitioner has cited a number of cases to the point that where the construction of a state statute is involved the decision should be referred by the Federal Courts to the state courts. The law is not so sweeping and the decisions are not so broad in their scope. The true rule is, particularly where the plaintiff submits a case to the Federal Court which requires the Court to make a decision on the basis of what it believes the law to be in the state or what it believes the state highest court will ultimately and authoritatively declare the law to be, that the Federal Court will decide the question of the state law for itself. *Maryland Casualty Co. v. Cassetty,* 119 Fed. (2d) 602; *New England Mutual Life Insurance Co.*

v. Mitchell, 118 Fed. (2d) 414, certiorari denied 62 S. C. 60, 314 U. S. 629, 86 L. Ed. 505; *Delong v. Jefferson Standard Life Ins. Co.,* 109 Fed. (2d) 585, certiorari denied 310 U. S. 635, 60 S. C. 1081, 84 L. Ed. 1405; *Malloy v. New York Life Ins. Co.,* 103 Fed. (2d) 439, certiorari 308 U. S. 572, 60 S. Ct. 86, 84 L. Ed. 480; *Propper v. Clark,* 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 436; *Chicago, etc., Coal Co. v. Herr,* 127 Fed. (2d) 1010, certiorari denied 317 U. S. 669, 63 S. Ct. 74. Of course, the Federal Court need not engage in mere speculation as to how the state court would decide the question but, as pointed out above, neither Federal Court that passed on this case found it necessary to engage in speculation. Both of them came to the same conclusion.

A Federal Court may decide for itself the proper construction of a state statute and indeed it is the duty of a Federal Court to construe a state statute, not already construed by the state court, where it becomes necessary in the case before it. *Portneuf-Marsh Valley Canal Co. v. Brown,* 274 U. S. 630, 47 S. C. 692, 71 L. Ed. 1243; *Stone v. Interstate, etc., Co.,* 103 Fed. (2d) 544, 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 442; *In re Boswell,* 96 Fed. (2d) 239; *Cromwell v. Hillsborough Twp.,* 149 F. (2d) 617, affd. 326 U. S. 620, 66 S. Ct. 445; *Baywell v. Springfield, etc., Co.,* 144 F. (2d) 65, cert. den. 323 U. S. 735, 65 S. Ct. 72; *Barnes v. Retail, etc., Assn.,* 125 F. (2d) 645.

We have here a case that was instituted by Petitioner in the Federal District Court and carried through to a conclusion in the Circuit Court of Appeals and two Nebraska Judges have said that the tariff under which Petitioner seeks recovery is invalid because it was not filed with the Secretary of State as per statute. How

will the judicial processes be served by setting aside everything that has been done on the theory that possibly the Judges of the Supreme Court of Nebraska, in a case which has not yet even been heard in the trial Court, will come to different conclusions.

In the Meredith case, supra, this Court said:

> "To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstance which would warrant a refusal to exercise it."

Paraphrasing the above, to remit the parties to the state courts in this case is to delay further the disposition of litigation which has been pending for more than three years and which has already been decided by the District Court and the Circuit Court of Appeals. It is to favor—not penalize—the parties who selected the jurisdiction in which they wished to try their lawsuit and who would now like to have it decided in some other jurisdiction.

Respectfully submitted,

YALE C. HOLLAND,
LEO EISENSTATT,
Attorneys for Respondent.